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CITATIONS

CONSTITUTION, STATUTES AND RULES:

TREATISES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 67

PAUL THEODORE CHEFF, *Petitioner,*

v.

ELMER J. SCHNACKENBERG, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 15-24) is reported at 341 F. 2d 548.

JURISDICTION

The judgment of the Court of Appeals was entered January 27, 1965 (R. 25-28). The petition for a writ of certiorari was filed on April 8, 1965, and certiorari was granted on November 15, 1965. The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether, after denial of a demand for jury trial, the sentence of imprisonment of six months imposed upon petitioner is constitutionally permissible under Article III and the Sixth Amendment.

CONSTITUTIONAL PROVISIONS

The provisions of the United States Constitution involved are Article III and the Sixth Amendment. Article III, Sec. 2, par. 3, provided in pertinent part:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

STATEMENT

In this case, Petitioner was found guilty of criminal contempt and sentenced to imprisonment for a period of six months by the Court of Appeals for the Secenth Circuit for willfully causing violations of a pendente lite order of that Court enforcing a cease and desist order of the Federal Trade Commission. (R. 25)

On July 7, 1958, in an administrative proceeding entitled "In the Matter of Holland Furnace Company, a corporation, Docket No. 6203," the FTC entered an order commanding said corporation "and its officers, agents, representatives, and employees," in connection with the sale of furnaces and heating equipment

in commerce, to cease and desist from eight specified practices found to constitute unfair methods of competition under the Federal Trade Commission Act. (R. 1)

Thereafter, in the course of a proceeding initiated by the Holland Furnace Company (hereinafter sometimes called Holland) to review the FTC cease and desist order, the Court of Apepals for the Seventh Circuit, on application of the FTC, entered a pendente lite order on August 5, 1959, commanding the Holland Furnace Company to comply with the cease and desist order "until and unless said order . . . be set aside . . . or until further order of . . .(the) Court" (R. 3&4). Petitioner was not a party to the FTC proceedings or to the review proceedings in the Court of Appeals, nor was he named in the Court's pendente lite enforcement order. Both the FTC cease and desist order and the Court's order enforcing the same were limited to prohibiting eight deceptive sales practices, and neither contained any provision specifying what steps or affirmative actions were required to be taken by the company of its executives to prevent violations. (R. 3&4)

On Petition of the FTC, the Court of Appeals, on April 26, 1963, issued a rule to show cause against Petitioner (who, during the relevant period, had been a director, president and chief executive officer of Holland) and against six other directors and four other Holland executives; each of these persons was required to show cause why he should not be held in criminal contempt

> "by reason of having knowingly, wilfully and intentionally caused, and aided and abetted in causing, respondent Holland Furnace Company to vio-

late and disobey, and fail and refuse to comply with . . . (the pendente lite order of the Court) entered on August 5, 1959 . . . ." (R. 4&5)

Also on April 26, 1963, an order was entered appointing counsel for the FTC as attorneys to prosecute the proceeding on behalf of the Court (R. 6&7).

Petitioner filed a verified answer to the rule to show cause denying that he had knowingly, wilfully or intentionally caused and aided and abetted in causing Holland Furnace Company to violate and fail and refuse to comply with the Court's order of August 5, 1959 (R. 10).

On October 9, 1963, the Court of Appeals ordered the Petitioner to file on or before November 8, 1963, an election of trial by jury or a waiver of a jury trial (R. 11).

In accordance with the order of the Court, the Petitioner elected a trial by Jury (R. 11&12).

On May 27, 1964, the Court of Appeals denied the election of a trial by jury made in accordance with its order of October 9, 1963 (R. 14).

The proceeding was tried by the Court of Appeals, which heard evidence. On January 27, 1965, the Court rendered an opinion (R. 15) and entered a judgment order (R. 25): finding that Petitioner "knowingly, wilfully and intentionally caused, and aided and abetted in causing, in one or more instances, violations by Holland Furnace Company of each of the eight prohibitions in the August 5, 1959, order of this court."

In this order of the Court, the eight prohibitions were:

(1) Representing, directly or indirectly that any of its employees are inspectors or are employees or representatives of government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

(3) Representing that any furnace manufactured by a competitor is defective or not repairable, or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or that the manufacturer of such furnace is out of business, or that parts of such furnace are unobtainable, unless such are the facts.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

SUMMARY

1. Criminal contempt is included in the provisions of Article III and Amendment 6 of the United States Constitution.

2. The sentence of six months' imprisonment is not constitutionally permissible because contempt powers in administrative law cases are civil, not criminal.

3. Petitioner was entitled to a jury trial under the provisions of Article III, Sec. 2 of the Constitution and the Sixth Amendment before he could be sentenced to a term of six months' imprisonment. The severity of the sentence, imprisonment for six months, imports a crime which is not punishable except in accordance with the dictates of the Constitution.

ARGUMENT

The Intent of the Framers of the United States Constitution Was Not to Exempt Criminal Contempt from the Provisions of Article III and Amendment 6

Seven hundred fifty years ago, the barons of the English realm wrested from the despotic King John certain fundamental rights which no sovereign could override. These rights were set forth in the great compact known as Magna Carta. The most important part of that document is the famous 39th Clause of the Magna Carta: "No free man shall be taken, imprisoned, disseised, outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."

In addition to Clause 39, the Magna Carta contains Clause 40 that provides for a speedy trial: "To no one will we sell, deny, or delay right or justice."

Here is the kernel of the American judicial ideal of equal justice under law for every man. Whatever the barons and bishops who forced King John to sign the Charter may have intended, Magna Carta now stands for many of the cherished rights of free men. Foremost among these rights is trial by jury.

One hundred ninety years ago, the delegates to the United States Constitutional Convention met with nothing else in view but to provide for posterity against the wanton exercise of power which could not otherwise be done than by the formation of a fundamental constitution. In order to further that purpose, they wrote into the Constitution of the United States two clauses guaranteeing the right to trial by jury. Article III provided that the trial of all crimes except in cases of impeachment shall be by jury, similar to the 39th Clause of the Magna Carta. The Sixth Amendment provided that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, similar to the 40th Clause of the Magna Carta.

The framers of the Constitution were well aware that in colonial days the courts had exercised the power to try criminal contempts with a vengeance, but without a jury. They sentenced people to be whipped, humiliated in stocks and even nailed by the ear to a pillory. The framers of the Constitution resented the inhumane treatment parcelled out by these courts.

These courts were operating under a colonial governor who owed his power to His Majesty King George III. Their writs and orders were issued under

the authority of King George III, and indeed these papers included the particular year of the King.*

In Massachusetts, so great was the resentment of the colonists against these courts that the House of Representatives voted to impeach the judges. This came about because His Majesty King George III commanded that the judges should receive salaries from the King. The vote of impeachment was, of course, rejected by the Governor, but it remained on the journals of the House and was printed in the newspapers and went abroad into the world. The result was that Grand and Petit Jurors refused to take their oath because, in their minds, the courts stood impeached by the representatives of the people for high crimes and misdemeanors. *Works of John Adams,* Vol. 10, pp. 236-240. Letter to William Tudor.

In Massachusetts, as probably in the rest of the colonies, the judges were Royalists loyal to the mother country. At the outbreak of the Revolution, they fled the colonies or retired into seclusion

The framers of the Constitution, on the other hand, were men who had risked their lives and property and their sacred honor to provide for themselves and posterity against the wanton exercise of power. They most certainly did not intend to put the stamp of their approval on the criminal contempt power of these

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* In April, 1776, a resolve was passed to alter the style of writs and other legal processes and substitute for George III in these papers the name of "The People and Government of Massachusetts," and in dating all official papers to omit the particular year of the king and give only the year of our Lord. Proceedings of the Second Provincial Congress, printed edition of 1838, pp. 262, 263, under date of May 27, 1775.

judges, but they did intend to guard against the oppressions of future magistrates by doubly guaranteeing trial by jury.

Because the deliberations of the framers of the United States Constitution were private and behind closed doors, it is difficult to obtain any great number of direct quotes from the delegates. However, we have a few bearing upon the right to trial by jury.

Elbridge Gerry, delegate from Massachusetts to the Constitutional Convention, urged the necessity of juries to guard against corrupt judges. Farrand, Max, *The Records of the Federal Convention of 1787,* New Haven, Yale University Press, 1911, Vol. II, p. 587. If one of the reasons for granting trial by jury in two instances was to guard against corrupt judges, then of course there could be no exemption from either Article III or Amendment 6 in criminal contempts.

Edmund Randolph, in the Virginia Convention, June 6, 1788, Farrand, Max, *The Records of the Federal Convention of 1787,* Vol. III, p. 309, reported, "The trial by jury in criminal cases is secured—in civil cases it is not so expressly secured as I could wish it." The conclusion is inevitable that he meant that in all criminal cases, as we understand the meaning of criminal cases, the right to a trial by jury is secured by the Constitution.

Alexander Hamilton, in his report *To the People of the State of New York,* had this to say about what the Constitutional Convention intended with relation to trial by jury:

> "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial

> by jury: Or if there is any difference between them, it consists in this; The former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government." Hamilton, Alexander, *The Federalist,* Trial By Jury, "To the People of the State of New York," The Belknap Press of Harvard University, pp. 521-522.

There might have been, and indeed there was, disagreement with respect to "freedom of religion, freedom of the press and free speech," but concerning the right to trial by jury the delegates to the Convention were in complete agreement. They were mindful of the misuse of the contempt power by the colonial courts and wished to be protected from any such oppressions in a future popular government.

James Madison, Father of the Constitution, in a discussion about the manner in which the United States Senate should be selected, said:

> "I mean, however, to preserve the state rights with the same care as I would trials by jury." Brant, Irving, *James Madison, Father of the Constitution,* p. 89.

It is quite clear from the above that the right to a trial by jury was considered the ultimate right, fun-

damental and admitting of no discussion. It is a constitutional right that is conclusive and definitive.

It is an historical error to permit the courts to impose fixed sentences of imprisonment. The courts have the inherent power to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. When it is asserted that the courts have a right to go beyond compliance and sentence a man to imprisonment for a fixed term, it would be well to remember that any such right is in conflict with a greater right, the right to a trial by jury as doubly guaranteed by the Constitution. (Article III & Sixth Amendment)

Petitioner will not attempt to repeat the discussion of the dissenting Justices in *United States* v. *Barnett,* 376 U.S. 681, 12 L. Ed. 2d 23, or in *Green* v. *United States,* 356 U.S. 165. They develop soundly the proposition that criminal contempt is a crime which entitles the defendant to a trial by jury.

The Sentence of Six Months Imprisonment Is Not Constitutionally Permissible Because Contempt Powers in Administrative Law Cases Are Civil, Not Criminal

In this case, the Petitioner was sentenced to imprisonment for a period of six months for wilfully causing violations of a pendente lite order of the Court enforcing a cease and desist order of the Federal Trade Commission.

The Federal Trade Commission Act, Ch. 311, 38 Stat. 717, Title 15, Sec. 41, et cet., U.S.C.A., empowered the Federal Trade Commission to issue orders directing violators to cease and desist from using unfair methods of competition. It also provided that if the Commission's order was violated then the Commission

could apply to a circuit Court of Appeals for enforcement of the order.

There are other administrative agencies that have been authorized by act of Congress to petition the Circuit Courts of Appeals for the enforcement of their orders:

National Labor Relations Act, 49 Stat. 449, Title 29, Sec. 151, et cet., U.S.C.A., Ch. 372.

Federal Power Act, Title 16, Sec. 791, U.S.C.A. Amend., Ch. 28541, Stat. 1063.

Federal Seed Act, Title 7, Sec. 1551, U.S.C.A., Ch. 615, 53 Stat. 1275.

Packers and Stockyards Act, Title 7, Sec. 181, U.S.C.A., Ch. 64, 42 Stat. 159.

Natural Gas Act, Title 15, Sec. 717, U.S.C.A., Ch. 556, 52 Stat. 821.

None of these statutes contain a Congressional grant to a United States Court of Appeals to try and punish people for criminal contempt of court. Since the devisions of these federal bureaus affect more and more of the particulars and details of the business life of our country, it would be unjust to the businessmen of our country to deny them the right to trial by jury.

In a National Labor Relations Act procedure, the United States Court of Appeals, Second Circuit, regarded the violations of Courts of Appeals orders as civil contempts. *N.L.R.B.* v. *Mastro Plastics Corp.*, 261 Fed. 2d. 147.

In another case, the Second Circuit Court of Appeals has said that in a violation of a Court of Appeals order enforcing an NLRB order the purpose is wholly remedial, and since its purpose is wholly re-

medial, the proceeding is one for civil contempt rather than criminal contempt. *N.L.R.B.* v. *Hopwood Retinning Company,* 104 F. 2d 302.

The Seventh Circuit Court of Appeals in the case of an FTC order regarded the contempt as criminal. *F.T.C.* v. *A. McLean & Son,* 94 F. 2d 802.

There is a conflict between the Second Circuit Court of Appeals and the Seventh Circuit Court of Appeals on the question of whether the Courts of Appeals' contempt power in administrative law cases is civil or criminal. None of the statutes above cited contain a clear and unequivocal Congressional grant or indeed say anything about enforcing the Courts' orders. In the absence of any Congressional authority, it is submitted that the administrative law cases should be regarded as involving civil contempt.

The instant case vividly illustrates why violation of a decree of a court enforcing an administrative order should be considered civil contempt, not criminal.

Prior to reference to the Court of Appeals, there had been two years of hearings and over five thousand pages of testimony. These hearing were conducted by an FTC Examiner. In these hearings the rules concerning the materiality and relevancy of evidence are virtually suspended. Any evidence is admitted. Proof by a fair preponderance of the evidence or beyond reasonable doubt is foreign to such hearings.

It is understandable that the Court of Appeals, already overburdened by a huge volume of cases, would seek to shorten the proceedings by relying upon the

Federal Trade Commission's testimony and the aid of its representatives.

In this case, the Court of Appeals appointed counsel for the FTC as attorneys to prosecute for criminal contempt (R. 6).

The proof that the Court of Appeals hearings took on not only the color but also the substance of an FTC hearing can be found in the Court's opinion (R. 15). In that Court order it can be seen that the basis for the conviction and the imposition of six months imprisonment rested almost entirely upon FTC type of evidence, such as: Petitioner did not travel to meet with Better Business Bureaus in various parts of the country; he did not go out into the field to meet with branch managers and salesmen to compel compliance; he did not take pains to see that his entire sales organization understood the seriousness of compliance as did his successors in management by bringing two thousand salesmen to Holland, Michigan; his bulletin avoided using the word "discharge" and it was also ineffective to influence radical changes in Holland's sales policy; the sales heirarchy was loose; the relationship between the Petitioner and the sales managers was tenuous; Petitioner remained aloof from the sales managers, division managers and salesmen.

There is no evidence that Petitioner's conduct caused any violation of any of the eight provisions of the cease and desist order. In any event, the recorded evidence falls far short of proving beyond a reasonable doubt that Petitioner is guilty of knowingly, wilfully and intentionally causing and aiding and abetting in causing, in one or more instances, violations of each

of the eight provisions in the cease and desist order. *Michaelson* v. *United States,* 266 U.S. 42, 66 (1924); *Gompers* v. *Buck Stove and Range Company,* 221 U.S. 418, 444 (1911).

There is no reason for relaxing the normal standards of proof required to sustain a conviction under Title 18, Sec. 401(3). *Green* v. *United States,* 356 U.S. 165, 2 L. Ed. 2d 672, 711, dissenting opinion, Mr. Justice Brennan.

Petitioner made request for "special findings" under Rule 23(c) of the Rules of Criminal Procedure. Although this rule says, "In a case tried without a jury, the court shall make a general finding and shall in addition on request find the facts specially," the Court, in lieu of making the "special findings" requested, made its own findings of fact (R. 17).

The Petitioner's conviction on this record is a clear abuse of contempt power and clearly shows the correctness of the Second Circuit Court's decisions regarding administrative law cases as involving civil contempt.

The Imposition of the Sentence of Imprisonment for Six Months After Denial of a Jury Trial Violates Article III and the Sixth Amendment

This is the first time that an officer of a corporation has been sentenced to imprisonment upon petition of the Federal Trade Commission for criminal contempt of a United States Court of Appeals order. The corporate respondent was fined $100,000. Two other officers of the company were fined $500 each, and the Petitioner was sentenced to six months in prison because he was the dominant head of the company from

August 5, 1959, until May, 1962 (R. 20) and failed to make policy changes in the company's business.

The Petitioner had not been an officer of the company since May, 1962. The Judgment of the Court of Appeals was imposed January 27, 1965. For two and one-half years, the Petitioner's successors in management had ceased and desisted in such a manner as to win the compliments of the Circuit Court of Appeals (R. 21). In fact, during this period of time, the company had completely withdrawn from the business of replacement of furnaces, which is the area in which the violation is alleged. The sentence is therefore entirely punitive. The absence of any necessity of assuring future compliance should have been considered in imposing sentence. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 303.

The Court of Appeals should have used the least possible power adequate to enforce its order and protect its dignity. *Bigelow* v. *RKO Radio Pictures,* 78 F. Supp. 250; *In the Matter of Criminal Contempt of Thomas C. McConnell, Petitioner,* 370 U.S. 230, 8 L. Ed. 2d 434.

In *Ballantyne* v. *United States,* 237 F. 2d 657, 667, Circuit Judge Cameron stated:

> "It is abhorrent to Anglo-Saxon justice as applied in this country that a man, however lofty his station or venerated his vestments, should have the power of taking another man's liberty from him. Society has permitted only one exception, a limited right of courts to punish for contempt. But that right has been grudgingly granted, has been held down uniformly to the least possible power adequate to the end proposed."

The Holland Company operated in 44 states with 475 branch offices. It had a field organization of approximately 5,000 employees. *Holland Furnace Company, Petitioner,* v. *Federal Trade Commission, Respondent,* No. 12451, U.S. Court of Appeals, 7th Circuit, 295 F. 2d 302. Modern business practices require that officers of large corporations delegate duties to and rely upon other officers and employees. It is unrealistic to assume that, because a man is president and the dominant head of Holland Furnace Company, he is responsible for any actions of subordinate sales employees that might have violated one or more of the eight prohibitions covered by the order. Petitioner's conviction was not based upon a charge or evidence that he personally engaged in any of the eight deceptive practices. There is no evidence that there has been a single prosecution of any sales employee for the crimes alleged in the cease and desist order.

The sentence of the Court of Appeals is not based upon any affirmative action but rather on the failure by Petitioner to make policy changes. Since none of the sales policies and other matters relied upon by the Court of Appeals were required to be changed or were covered in any way by the FTC order as enforced by the Court's order, the Petitioner's failure to act in accordance with the Court's idea of the way the business should be conducted ought not to subject him to a penalty of six months. It is fundamental that no man should be held criminally responsible for conduct which he could not understand to be proscribed or required. *United States* v. *Harris,* 347 U.S. 612, 617. The Petitioner certainly should not be sentenced to prison for six months for conduct

which was not proscribed or required in the cease and desist order. *In Re Floersheim,* 316 F. 2d 423 (9th Circuit, 1963).

The Floersheim case, *supra,* was a proceeding for criminal contempt of an order of the Court of Appeals enforcing an FTC cease and desist order. It was contended by the FTC that the forms used by the respondent were too "official looking" or "too demanding" or that the paper used was of a color and design sometimes used on checks, or that the address to which cards were to be mailed in Washington, D. C., assumed the government must be involved. The Court rejected such contentions as a basis for a contempt conviction, saying:

> "The short answer to these complaints is that the cease and desist order, as drawn, does not forbid such actions or use." 316 F. 2d 428.

Petitioner's conviction, since predicated upon an unforeseeable and ex post facto expansion of the narrow requirements of the Court order, should not subject him to a sentence of six months imprisonment.

In the instant case, the Petitioner could not reasonably have been expected to construe the Court order as requiring a change in a long-standing practice of paying salesmen on a commission basis or as calling for a reduction in the selling prices of heating equipment (R. 21). The cease and desist order, as drawn, did not forbid such actions, and the Petitioner could not therefore have had a specific intent to cause violations of an order which did not forbid paying salesmen commissions or order a reduction in the selling prices of heating equipment. Assuming that there is some evidence to prove that subordinate sales employees

did violate the order, there is simply no evidence whatsoever that Petitioner acted with the requisite specific intent or that his conduct was the cause of such violations. It is well settled that the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed. *Cammer* v. *United States,* 300 U.S. 399, 100 L. Ed. 474.

Petitioner was not a party to the cease and desist order of the Federal Trade Commission (R. 1). Petitioner was not a party to the Circuit Court of Appeals cease and desist order (R. 3). This lack of intention becomes increasingly apparent when it is understood that Petitioner was not a party to any proceedings up to and including the pendente lite order issued by the Court of Appeals and that there is not the slightest evidence that Petitioner's conduct caused any violation of any of the eight provisions of the cease and desist order. All of this shows a lack of intention to commit an act of contempt, which should have an important bearing on any penalty which should have been imposed.

A sentence of six months' imprisonment after the denial of Petitioner's demand for a trial by jury violates the Sixth Amendment. This was a criminal prosecution that grew out of a cease and desist order of the Federal Trade Commission issued July 7, 1958 (R. 1), and the FTC attorneys were appointed to prosecute for criminal contempt on April 26, 1963. It can readily be seen that the Petitioner did not enjoy the right to a speedy and public trial by an impartial jury. Neither did he enjoy the right to a speedy and

public trial by an impartial jury of the State and district wherein the crime shall have been committed.

In the case of *District of Columbia* v. *Clawans,* 300 U.S. 617, 81 L. Ed. 843, 850, Mr. Justice McReynolds, joined by Mr. Justice Butler in dissenting in part, had this to say:

> "We cannot agree that when a citizen is put on trial for an offense punishable by 90 days in jail or a fine of $300.00, the prosecution is not criminal within the Sixth Amendment. In a suit at common law to recover above $20.00, a jury trial is assured. And to us it seems improbable that while providing for this protection in such a trifling matter the framers of the Constitution intended that it might be denied where imprisonment for a considerable time or liability for fifteen times $20.00 confronts the accused.
>
> "In view of the Opinion just announced, it seems permissible to inquire what will become of the other solemn declarations of the Amendment. Constitutional guaranties ought not to be subordinated to convenience, nor denied upon questionable precedents or uncertain reasoning."

It is fair to comment that Mr. Justice McReynolds and Mr. Justice Butler would view with abhorrence a sentence of six months' imprisonment imposed without a jury trial and growing out of a violation of an FTC order.

On October 9, 1963, the United States Court of Appeals for the Seventh Circuit ordered the Petitioner to file an election of trial by jury or a waiver of a jury trial (R. 11). It is a reasonable inference from this action that the Court on that date at least felt that the Petitioner was entitled to a trial by jury.

On November 8, 1963, the Petitioner elected a trial by jury (R. 12). It was not until May 27, 1964, that the Court determined that the Petitioner was not entitled to a trial by jury and denied the demand for a jury trial made in accordance with its order of October 9, 1963. (R. 11, R. 14). *United States* v. *Barnett,* 376 U.S. 681, was decided in April, 1964. On January 27, 1965, the Court sentenced the Petitioner to imprisonment for a period of six months.

There is nothing in *United States* v. *Barnett,* supra, suggesting that the petty offense punishment limits contained in 18 U.S.C. Sec. 1(3) are applicable to a contempt proceeding, nor does it define petty offense.

The penalty that may be imposed in a non-jury trial criminal contempt case raises an important constitutional question under Article II, Sec. 2, para. 3, and the Sixth Amendment which this Court, not Congress, must decide.

In the *United States* v. *Barnett* case, supra, it was undisputed that there were affirmative actions of contempt, that there was a specific intent to commit contempt, and that there had been no compliance. In the instant case, there had been compliance for a period of two and one-half years before sentence (R. 20). There was no specific intent to commit contempt of the cease and desist order because the things upon which the Court of Appeals bottomed its sentence were not things that were contained in the cease and desist order (R. 1, R. 15). Therefore, the severity of the sentence of six months, without a jury trial that was inferred from the Barnett case, was in violation of Article III and Amendment 6.

It must be borne in mind that this was in the beginning a Federal Trade Commission cease and desist order later adopted by the Court of Appeals for enforcement. These proceedings are almost invariably against corporations where fines are the usual punishment. In this case, the Holland Company was fined $100,000, the largest fine in the history of FTC actions, whether in a civil penalty suit (15 U.S.C., Sec. 45(6)(1)) or a contempt proceeding. See Vol. 5, CCH Trade Reg. Rep. paras. 9701.40 and 9703 and cases cited therein.

In addition, two other officers were fined $500 each, but the Petitioner, who was President of the Corporation, was sentenced to six months' imprisonment. This is the first time in an FTC hearing that an officer of a corporation has been sentenced to a fixed term of imprisonment. Six months' imprisonment for criminal contempt is a far greater sentence than is usually given for criminal violations of the antitrust law (see Tefft, *United States* v. *Barnett,* Supreme Court Review, 1964, at p. 135).

A sentence of six months' imprisonment by a Circuit Court of Appeals is so substantial that it carries with it all of the odium attached to a sentence of two or three years. It destroys a man's reputation and takes away from him his ability to make a living in the business world. It forces him to live the rest of his years in shame and disgrace and dishonors his family. This punishment should not be imposed upon him without the opportunity of having the facts in his case passed upon by a jury of his peers, as is doubly guaranteed by Article III and Amendment 6 of the United States Constitution.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Seventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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January, 1966.